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Supreme Court of the United States

OCTOBER TERM, 1993

LLOYD EUGENE SCHLUP, JR.,

Petitioner,

—v.—

PAUL DELO, Superintendent,
Potosi Correctional Center,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AMICUS CURIAE OF FIVE INNOCENT FORMER DEATH ROW INMATES & CENTURION MINISTRIES IN SUPPORT OF PETITONER

ERIC M. FREEDMAN*
HOFSTRA UNIVERSITY
SCHOOL OF LAW
Hempstead, New York 11550
(212) 463-5167

**Counsel of Record*

HAROLD R. TYLER, JR.
PATTERSON, BELKNAP, WEBB
& TYLER
30 Rockefeller Plaza
New York, New York 10112
(212) 698-2500

Counsel for Amicus Curiae

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LLOYD EUGENE SCHLUP, JR.,

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PAUL DELO, Superintendent,
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for the Eighth Circuit

BRIEF AMICUS CURIAE OF FIVE INNOCENT FORMER DEATH ROW INMATES & CENTURION MINISTRIES IN SUPPORT OF PETITIONER

INTEREST OF AMICI

The *amici* submitting this brief are five ordinary citizens who were wrongly convicted of murder and sentenced to death. They are joined by a national organization dedicated to the investigation of prisoners' claims of innocence.[1]

Amici's interest in this case is simple: to remind the Court that the criminal justice system is a complex system run by human beings. Like all such institutions it is subject to failures whose precise mechanisms cannot easily be predicted in advance, but whose consequences are entirely foreseeable. In the case of condemned prisoners, the consequence of a breakdown of the constitutional safeguards that ordinarily validate a conviction can easily be a wrongful execution. The real-world circumstances of *amici's* cases are merely illustrative of errors -- whether made in good faith or otherwise -- that can cause the criminal justice

[1] The parties have consented to the filing of this amicus brief.

system to reach unjust outcomes, with potentially fatal results. As it considers the design of the safety valve that is to guard against this threat, we urge the Court to respond with a legal standard that is sufficiently pragmatic to respond to the practicalities of the situations in which people like those submitting this brief found themselves -- and others like them will find themselves in the future.

Randall Dale Adams is a resident of Ohio. In May, 1977, Mr. Adams was wrongly convicted and sentenced to death for the murder of Dallas, Texas police officer Robert Wood. Mr. Adams came within 72 hours of execution before a stay was entered. This Court later vacated his death sentence. ***Adams v. Texas***, 448 U.S. 38 (1980). Mr. Adams thereafter remained in prison for another decade before his innocence was established by volunteer counsel and a film maker, Errol Morris. Their efforts finally proved that Mr. Adams had been framed by the prosecution's knowing use of false evidence. He was released from prison in March, 1989.

Kirk Bloodsworth is a resident of Maryland. In 1984, he was wrongly convicted on the basis of several eye-witnesses of the murder, rape and first degree sexual offense of 9-year-old Dawn Hamilton, and sentenced to death. After these convictions were overturned because of the prosecution's failure to disclose exculpatory investigator reports that implicated another suspect, ***Bloodsworth v. State***, 512 A.2d 1056 (Md. 1986), Mr. Bloodsworth was again tried and convicted for these crimes and given three consecutive life sentences. ***Bloodsworth v. State***, 543 A.2d 382 (Md.App. 1988). After spending almost nine years in prison, Mr. Bloodsworth was released after sophisticated DNA testing showed that he could not be the individual who assaulted the victim.

Clarence Lee Brandley, an African-American resident of Texas, was wrongly convicted of capital murder and sentenced to death in January, 1981 for the death of sixteen-year-old Cheryl Ferguson, a white female. ***Brandley v. State***, 691 S.W.2d 699 (Tex.Cr.App. 1985). After years of

investigation, Brandley's attorneys and investigators showed that the conviction resulted from state prosecutors' suppression of material exculpatory evidence and state investigators' use of fundamentally unfair and racially-biased investigation procedures. In 1989, his conviction was overturned and he was released from prison. ***Ex Parte Brandley***, 781 S.W.2d 886 (Tex.Cr.App. 1989).

Joseph Green Brown is a resident of Maryland. In 1974, he was wrongly convicted of rape, robbery and capital murder and sentenced to death in Florida largely on the basis of one witness. ***Brown v. State***, 381 So.2d 690 (Fla. 1980). After he had come within 15 hours of execution, he and his attorneys showed that his conviction was based largely upon testimony that was known by the prosecutor to be false. ***Brown v. Wainwright***, 785 F.2d 1457 (11th Cir. 1986). Mr. Brown was released from prison in 1987.

Walter McMillian is an African-American resident of Alabama. After a perfunctory two-day trial in

1988, he was wrongly convicted and sentenced to death for the murder of Rhonda Morrison, a white woman. As a result of four years of determined investigation by volunteer counsel, several new credible defense witnesses were located and the three essential state witnesses admitted that their trial testimony was false and had been procured by state investigators through previously undisclosed promises of lenient treatment and reward money. In 1993, Mr. McMillian was released from prison after state officials conceded his innocence. ***McMillian v. State***, 616 So.2d 933 (Ala.Cr.App. 1993).

Centurion Ministries is a non-profit organization headquartered in Princeton, New Jersey. Its purpose is to provide investigative resources to innocent citizens who have been wrongly convicted and imprisoned. Since its founding in 1983, Centurion Ministries has devoted thousands of hours of investigative resources to cases throughout the country and has won the release from prison of a dozen innocent men and women.

Randall Dale Adams, Kirk Bloodsworth, Clarence Lee Brandley, Joseph Green Brown, Walter McMillian, and Centurion Ministries are uniquely familiar with the adversities and travails a wrongly-convicted citizen, especially one on Death Row, faces when he or she attempts to demonstrate his or her innocence in post-conviction proceedings.

SUMMARY OF ARGUMENT

The purpose of this Court's miscarriage of justice doctrine is straightforward: to protect legitimate finality interests, while giving meaning to the promise that in appropriate cases -- notably cases in which a constitutional violation has contributed to the conviction of a person who is actually innocent -- finality principles "yield to the imperative of a fundamentally unjust incarceration," ***Engle v. Issac***, 456 U.S. 107, 135 (1982).

Justice Powell's plurality opinion in ***Kuhlmann v. Wilson***, 477 U.S. 436 (1986) took a commonsense approach to the problem. He wrote that a court considering

a miscarriage of justice argument must consider all the evidence bearing on guilt now available, and determine whether there is a fair probability that, if fully informed, the original trier of fact would have entertained a reasonable doubt as to guilt. *Id.*, at 455 n.17. This standard accomplishes that which the miscarriage of justice doctrine was designed to do: it subordinates otherwise valid finality interests and allows for consideration of procedurally forfeited constitutional challenges to a conviction upon a showing of innocence that would likely have prevailed at trial.

Mr. Schlup's attorneys will surely set forth the legal reasons why the *Kuhlmann* test ought to be retained. Our focus is elsewhere. We explain why that test is the only meaningful one to apply in light of the realities facing the wrongly condemned. Miscarriages of justice do happen; in the real world, the task of demonstrating innocence after conviction is a daunting -- almost overwhelming -- enterprise. The Court would drain any practical meaning

from the promise of ultimate fairness that undergirds the miscarriage of justice doctrine if it were to adopt a legal standard more rigid than the one set forth in *Kuhlmann*.

ARGUMENT

I. Convicting The Innocent Is Easier Than Clearing Them

A. *A Sketch of the Problem*

It is not the premise of the miscarriage doctrine that the system is incapable of accuracy but rather that it is capable of error. The very phase "miscarriage of justice" was used by Felix Frankfurter in the closing chapter of his careful study of Sacco and Vanzetti to describe one of those "striking instances in which the machinery of the criminal law worked injustice which was later corrected,"[2] and from which [Justice] Frankfurter -- who was then "[s]peaking from a considerable experience as a prosecuting officer, whose special task for a time it was to sustain on

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[2] FELIX FRANKFURTER, THE CASE OF SACCO AND VANZETTI, 108 (1927).

appeal convictions for the Government"[3] -- drew the final conclusion of his book:

> "[These instances] in no wise imply an attempt to undermine the necessary safeguards of society against crime. . . . Rather do they reveal confidence in our institutions and their capacity to rectify errors. They also serve to warn against too marked an assumption that, because ordinarily the criminal machinery affords ample safeguards against perversions of justice, a situation may not arise where extraordinary circumstances have deflected the operation of the normal procedure."[4]

"We cannot know how many mistakes are literally buried."[5] But we do know that "the danger of wrongful execution is chillingly real. Whether one gains insight from scholarly studies, current judicial proceedings,

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[3] *Id.*, at 104.

[4] *Id.*, at 110.

[5] Vivian Berger, *Herrera v. Collins: The Gateway of Innocence for Death-Sentenced Prisoners Leads Nowhere*, 35 Wm. & Mary. L.Rev. 943, 1008 (1994).

or by experiencing the intensity of community pressures to convict someone -- anyone -- of these atrocious crimes, it is difficult to deny that there is a special danger of factual error in capital cases."[6]

Evidence of innocence in those cases often tends to emerge only at a relatively late stage. Because of the special pressures capital litigation visits upon all actors in the criminal justice system, "it is often only after the passage of time that witnesses -- whether law enforcement officers, prosecutors no longer in office, or prisoners released from custody -- are willing to come forward."[7] Moreover, as Mr. Schlup's case itself certainly illustrates, the poor quality of legal representation too often seen in capital cases "tends to improve somewhat as a prisoner moves through the system, since the insufficiency of legal resources results in a system of triage that generally finds the most

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[6] Eric M. Freedman, *Innocence, Federalism and the Capital Jury*, 18 N.Y.U. Rev. L. & Soc. Change 315, 316 (1990-91) (footnotes omitted).

[7] *Id.* at 316 n.7.

qualified lawyers concentrating their efforts on those defendants closest to execution."[8]

The combined effect of these factors is that whether evidence of innocence emerges earlier or later during the course of post-conviction proceedings is frequently dependent upon fortuitous circumstances that bear no relationship to the justice of executing the prisoner.

As the cases of each of the individual *amici* so vividly demonstrate, convicting an innocent person is less difficult in practice than in theory. A prosecutor's decision to withhold a uniquely exculpatory piece of evidence, his or her presentation of a dishonest witness or misleading exhibit, the testimony from an earnest but mistaken eyewitness, or defense counsel's failure to conduct an adequate investigation, each can undetectably subvert the trial process and can seal an innocent citizen's fate.

But subsequent efforts to uncover such crucial

[8] *Id. See also* Thurgood Marshall, *Remarks on the Death Penalty made at the Judicial Conference of the Second Circuit*, 86 Colum. L. Rev. 1 (1986).

deadly flaws usually consume years, hundreds upon hundreds of hours of reinvestigation, and the expenditure of considerable resources -- which must be scrounged from somewhere, meaning, practically speaking, contributed by *pro bono* counsel or some nonprofit agency that is already overwhelmed by other imperative demands.[9]

A miscarriage of justice doctrine that is true to its name will recognize these factors and not demand a showing that even a truly innocent person will, realistically, be unable to make.

B. *The Details of the Picture*

1. Justice Can -- and Does -- Miscarry in A Variety of Ways

The simple fact is that innocent citizens can be, and are, wrongly convicted of capital crimes today. The experiences of *amici* demonstrate just a few of the possible causes: dishonest police investigators, con-artist informants,

[9] *See generally* Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 Am. U. L. Rev. 1, 79-92 (1990)(herein "ABA Task Force Report").

unscrupulous prosecutors, or their own indolent counsel.

a. The Dishonest Investigator

Mr. Brandley was railroaded by a state investigator who chose repeatedly to ignore evidence that incriminated a white suspect. The investigator instead insisted that the entire investigation be directed toward building a case against Mr. Brandley.[10] Leads inculpating someone other than Mr. Brandley, such as the presence of a caucasian pubic hair on the victim's body, were disregarded. This investigator also intimidated witnesses, and even threatened to kill one, to obtain testimony consistent with his theory of the case.

In part, this dogged determination to "get" Mr. Brandley was driven by racism. As one witness later testified, Mr. Brandley was charged with the crime after it was determined "that 'the nigger' . . . was big enough to have committed the crime; therefore 'the nigger was

[10] ***Ex parte Brandley***, 781 S.W.2d 886, 890 (Tex.Cr.App. 1989).

elected.'"[11]

An overzealous, dishonest sheriff's investigator was similarly responsible for framing Jerry Banks. Banks, then a happily married young African-American father of three, was twice convicted and death-sentenced.[12] While out hunting one day, he came upon the bodies of a white high school band instructor and one of the instructor's former female students. As would any good citizen, Banks immediately notified the police. This act of civic duty led to his being charged with the murders.

No evidence or motive linked Banks to the crime until an investigator planted several shotgun shells that matched Banks' old shotgun near the scene of the crime. This evidence proved sufficiently persuasive to twice induce juries to convict Banks for the murders and to

[11] ***Id.***, at 890.

[12] ***Banks v. State***, 268 S.E.2d 630 (Ga. 1980). Banks' first conviction was overturned because the prosecution withheld exculpatory material. ***See Banks v. State***, 218 S.E.2d 851 (Ga. 1975).

sentence him to death.[13] Only after years of dogged effort by lawyers convinced of their client's innocence did he achieve judicial vindication.[14]

The appalling tactics utilized in ***Banks*** and ***Brandley*** are not aberrations. In the past year, several New York State patrol evidence technicians have been convicted of manufacturing evidence and testifying falsely in scores of trials.[15] One of these officers, David Harding, told investigators that he was encouraged by superiors to falsify evidence and that other police investigators did as he did. These assertions rang true to Gerald Arenberg, a retired police officer and Executive Director, National Chiefs of

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[13] At both trials, Banks was represented by an attorney who was later disbarred. *See* ***Banks v. State***, 268 S.E.2d at 631. Counsel's fee was a retainer of $10, "a kettle of fish and some collard greens." Brenda Mooney, *Banks' Release Has Kids 'Jumping Like Squirrels,'* **Atlanta Constitution**, December 24, 1980 at p. 1.

[14] ***Banks v. State***, *supra*. Just three months after his release, Mr. Banks committed suicide.

[15] *Officer Harding*, **CBS 60 Minutes**, March 28, 1993 at 12-16; *Former State Trooper Explains Ways He Fabricated Evidence*, **New York Times**, April 17, 1993 at B-5; *Ex-Trooper Gets Prison for Faking Evidence*, **New York Times**, June 12, 1993 at L-26.

Police, who is regularly informed of reports of faked evidence. He recently explained:

> What you learn in police school is to obey the law, the constitutional rights of citizens. Then you go out and start riding with older officers who are more experienced. And they say, 'Well listen, what they taught you in police school, forget about it because this is the real world. Now in order for us to make cases, we're going to have to do -- take some shortcuts.'[16]

Moreover, a commission studying corruption in the New York City Police Department has identified similar problems. "Falsifying Department records and making false statements is not uncommon among certain police officers, even among those who do not engage in other kinds of misconduct."[17]

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[16] *Id.* at 16.

[17] Interim Report and Principal Recommendations of Commission to Investigate Allegations of Police Corruption and Anti-Corruption Procedures of The New York City Police Department, December 27, 1993 at 10 (herein "Mollen Report").

b. The Con-man Informant

It's hardly news that prosecutors often rely heavily upon the testimony of a "snitch" or informant to establish an essential portion of the state's case. Sometimes, this evidence is later shown to be worthless, as the informant was willing to say anything to gain favor in his own case. This Court has announced constitutional rules that are designed to minimize this risk,[18] but the rules are sometimes ignored or prove ineffective.[19]

Mr. Adams certainly understands this point; the most damaging evidence against him came from informant David Harris who later admitted that his trial testimony inculpating Mr. Adams was untruthful, and had been given to secure a deal in his own case.[20]

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[18] *See Napue v. Illinois*, 360 U.S. 264 (1959); *Giglio v. United States*, 405 U.S. 150 (1972).

[19] *See, e.g., Brown v. Wainwright*, 785 F.2d. 1457 (11th Cir. 1986) (prisoner sentenced to death in trial at which prosecutor knowingly argued falsely to jury that no deal had been struck for testimony of key witness).

[20] *Ex parte Adams*, 768 S.W.2d 281 (Tex.Cr.App. 1989).

Mr. McMillian was similarly victimized. There, the state's most essential witness avoided capital murder charges himself by giving false evidence to convict Mr. McMillian; two other state witnesses were paid thousands of dollars for their false incriminating testimony.[21]

Over-reliance upon snitch testimony in Los Angeles has raised grave doubts about the credibility of numerous capital convictions there. In 1989, Leslie White, an inmate at the L.A. County Jail, showed authorities -- and reporters -- how he could easily gather enough information about a case during a few minutes on the telephone to concoct a "confession" that prosecutors could later use to obtain convictions.[22] White learned his trade during his many years of incarceration -- he had been in and out of prison thirty times since he was nine years old. In many of

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[21] *McMillian v. State*, *supra*, at 946.

[22] Mark Curriden, *No Honor Among Thieves*, ABA Journal, June, 1989, at 52.

his own cases, he was released early by making deals with prosecutors for testimony.

As a result of White's disclosures, the LA County District Attorney's office had to review more than 200 murder cases in which tainted informants provided important testimony. Sixteen of these cases are capital cases. Prosecutors have since confessed error in at least two murder cases because of unreliable informant testimony.[23]

Such use of informants, who have everything to gain and little to lose by telling the police what they wish to hear, is growing and is lessening the integrity of the system. A recent report notes that various governmental agencies have paid crooks upwards of $40 million to help solve crime.[24] Information and evidence plied by dollars and deals is more likely to be false as many informants "are

[23] Ted Rohrlich, *D.A. Admits Murder Trial Was Unfair*, **Los Angeles Times**, August 2, 1990, p. A1. Of course, given the tendency of governmental officials to protect their convictions -- especially their capital convictions -- at all costs, *see* 29-30 *infra*, defense efforts may well eventually reveal that some of the other convictions were also wrongful.

[24] *The Informers*, **CBS 60 Minutes**, March 28, 1993 at 1.

pathological liars."[25]

c. The Unscrupulous Prosecutor

While most prosecutors throughout the country steadfastly comply with constitutional and ethical standards while enforcing the law, some do not. The temptation to disobey the law is strongest in capital cases. Failure to win a conviction or death sentence in a widely publicized case can stir public outrage, and harm a promising career. *Amici* have seen prosecutors withhold evidence or permit witnesses to testify falsely to insure convictions.

In Mr. Adams' case, the District Attorney lied to the trial court about the status of a crucial state's witness and failed to disclose to the defense evidence that would have shown that this witness committed perjury.[26] In Mr. Brandley's case, the prosecutor presented evidence that he

[25] *Id.* at 3.

[26] *See Ex parte Adams*, 768 S.W.2d at 285-87.

knew was not truthful.[27]

Again, these cases are illustrative, not unique. James Joseph Richardson's capital prosecution was plagued by similar problems. Nearly 22 years after being convicted for the poisoning deaths of his seven children, Mr. Richardson was released from prison when Attorney General Janet Reno, then serving as a special prosecutor appointed by the Governor, found that the trial prosecutor withheld crucial evidence that could have resulted in acquittal, allowed witnesses to lie, and made no attempt to correct their testimony.[28]

d. The Neglectful Defense Attorney

A defendant's own attorney can fail to act and thus not uncover and present evidence showing that the government is prosecuting the wrong person. Much as Mr. Schlup asserts, Donald Griffin told his attorney during their

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[27] ***Ex Parte Brandley***, 781 S.W.2d at 893.

[28] *See* Curriden, *supra* note 22, at 54. ***See also McDowell v. Dixon***, 858 F.2d 945 (4th Cir. 1988)(prosecutor failed to disclose surviving victim's initial description of assailant as white male; defendant was African-American).

first meeting that he was not guilty and provided several alibi witnesses. Neither his first nor second attorney made any effort whatsoever to speak to any of these witnesses except for Mr. Griffin's mother. ***Griffin v. Warden***, 970 F.2d 1355, 1356-57 (4th Cir. 1992). After trial counsel presented no alibi defense, the jury convicted Griffin of armed robbery on the basis of two eyewitnesses. With new counsel in post-conviction proceedings, Griffin later showed that several credible witnesses had been available to provide an alibi. The Fourth Circuit reversed Griffin's conviction after finding its confidence in Griffin's guilt "very much undermined." ***Id***.

In light of existing documentation of the inadequacies of many capital defense counsel,[29] it is not surprising that similar failings have come to light in other capital cases,[30] including ones in which the judicial system

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[29] *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.Rev. 1835 (1994); ABA Task Force Report, *supra* note 9.

[30] ***Martinez-Macias v. Collins***, 979 F.2d 1067 (5th Cir. 1992)("We are left with the firm conviction that Macias was denied his constitutional right to adequate counsel in a capital case in which actual innocence was a close question. The state paid defense

has initially denied relief because the evidence required to satisfy the prejudice prong of ***Strickland v. Washington***, 466 U.S. 668 (1984) was slow to emerge.

2. The Revelation of Miscarriages of Justice is Often Fortuitous

In the wake of cases like *amici's* -- where innocence is recognized and release from prison celebrated -- it is often heard that such vindication "proves the system worked." But more careful examination of the circumstances that ultimately led to relief shows that vindication depends upon an uncommon confluence of resources, time, and luck. If the Court's miscarriage standard is to achieve its purpose, it must take into account these harsh realities that frequently impede the revelation of innocence.

a. <u>The Problem of Resources</u>

Few indigent inmates possess the resources necessary to marshall a comprehensive reinvestigation of their cases, and many states still fail to provide adequate,

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counsel $11.84 per hour. Unfortunately, the justice system got only what it paid for").

compensated counsel for post-conviction proceedings.[31] Although the situation is theoretically better on federal habeas corpus,[32] Mr. Schlup's case demonstrates that this is not always true in the real world, especially in capital cases.

For understandable reasons, most notably the extraordinary investment of time and effort required to provide effective representation, many lawyers refuse to handle capital cases. "Taking on such a case means making a commitment to the full legal and factual evaluation of two very different proceedings (guilt and sentencing) in circumstances where the client is likely to be the subject of intense public hostility, where the state has devoted maximum resources to the prosecution, and where one must

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[31] *See* **Judicial Conference of the United States *Ad Hoc* Committee On Federal Habeas Corpus in Capital Cases, Committee Report and Proposal (August 23, 1989)(herein "Powell Committee"); ABA Task Force Report, *supra*, note 6.**

[32] **Unlike numerous states, Congress has provided for the appointment of counsel and for the availability of investigative resources for indigent condemned inmates who seek review of their cases pursuant to 28 U.S.C. § 2254. *See* 21 U.S.C. § 848 (1988).**

endure the draining effects of one's personal responsibility for the outcome."[33]

The effort that was required to show Mr. McMillian's innocence is not atypical. As his lead attorney told the Senate Judiciary Committee recently:

> The ease with which Mr. McMillian was convicted of capital murder and sentenced to death for a crime he did not commit, contrasted with the enormous difficulties we encountered in establishing his innocence and achieving his release, say much about the criminal justice system and innocence and the death penalty. *That it took four and a half years of litigation and thousands of hours of investigation* to free Mr. McMillian after wrongly convicting him in two days shows us that there are disturbing problems which must be corrected within our criminal justice system.[34]

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[33] *Legislative Modification of Federal Habeas Corpus in Capital Cases*, 44 Rec. Assoc. Bar City N.Y. 852, 854 (1989).

[34] Hearing on Innocence And The Death Penalty, Statement of Bryan A. Stevenson before the U.S. Senate Committee on the Judiciary, April 1, 1993 at 11 (emphasis added).

Counsel for Jerry Banks similarly expended thousands of hours of uncompensated time before they identified the witnesses who finally could show that the State had convicted the wrong man. One of his attorneys commented after Banks was freed that "no single lawyer could have adequately handled Banks' case, which involved 4000 hours of legal work. He said there should be a board of approved attorneys to handle death penalty cases."[35] The records in Mr. Adams' and Mr. Brandley's cases show that similar amounts of time and out-of-pocket expenses were required to vindicate their innocence.

There is a limited number of lawyers in the country who are willing to donate their time and the considerable resources required to demonstrate the factual unsoundness of a state conviction that arrives in federal court backed by apparently plausible evidence. Hence, the fact that, as in Mr. Schlup's case, a competent lawyer, who

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[35] Mooney, *supra* note 13 at 3-A.

collects the evidence of innocence, arrives later rather than sooner is neither surprising nor evidence of bad faith on the part of the prisoner. The inmate may well have been hounding volunteer organizations like the Centurion Ministries for help. The fact that he got it only belatedly casts no doubt on his claim of innocence, but rather is a stark reflection of his difficulties in vindicating that claim. A miscarriage of justice doctrine that would punish him for these circumstances beyond his control is hardly worthy of the name.[36]

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[36] It is no secret that many law enforcement officials are unwilling to aid investigations initiated by prisoners even when they know that the case "has problems." As the Executive Director of the National Association of Police Chiefs reminded us recently, "as police officers, we protect each other. We're a very thin blue line. It's you against us, and so we're not likely to turn in a brother officer," **CBS 60 Minutes**, *supra* note 15 at 16. The Mollen Commission reached similar conclusions:

> The code of silence influences a vast number of police officers, even those who are otherwise honest. Officers who violate the code of silence often face severe consequences. They are ostracized and harassed, become targets of complaints and even physical threats; and fear that they will be left on their own when they most need help on the street. Consequently, many honest officers take no action to stop the wrongdoing they know or suspect is taking place around them. The code of silence also often extends to superiors, who seek to protect their subordinates from charges of misconduct and their own careers from the taint of scandal.

Mollen Report at 6.

Again, the situation is particularly serious in capital cases because that is the context in which prosecutors and law enforcement officers most stubbornly refuse to concede error, even when there is no question that the wrong person has been convicted.[37] In Mr. Adams' and Mr. McMillian's cases, state prosecutors vigorously defended the guilty verdicts long after it became apparent that their key witnesses had lied and exculpatory information had been suppressed. In Mr. Brandley's case, even after it became clear that the State's case was fundamentally flawed and based upon perjured testimony and the suppression of much exculpatory material, the State fought hard to keep its judgment and for its right to Mr. Brandley's execution. To

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[37] Indeed, in a recent Pennsylvania capital case, prosecutors went so far as to wrongly accuse a fellow law enforcement officer -- who gave truthful testimony consistent with the defense innocence theory -- of fabricating evidence and committing perjury so that the State could win a conviction. ***Commonwealth v. Smith***, 615 A.2d 321 (Pa. 1992).

our knowledge, none of those officials have yet declared that they convicted the wrong man.

b. The Role of Luck

While each of the individual *amici* literally owes his life to his post-conviction attorneys, who personify the very finest traditions of the Bar, and to their volunteer investigators, some might still remain in prison or have by now been wrongly executed had it not been for sheer luck.

In Mr. Adams' case, it is now well known that despite counsel's best efforts, some of the crucial prosecution documents which showed perjury and suppression of exculpatory evidence were first discovered by an independent movie producer, Errol Morris. While law enforcement officials ignored repeatedly their duty to provide this information to the court and counsel, they gave it to journalist Morris. And it was only because of his pursuit of the story, in combination with counsel's independent efforts, that the truth of Mr. Adams' wrongful

conviction was fully brought to light.[38] Thus, a critical factor was the decision of Morris to interview residents of Death Row in Texas at that particular time.

An important lesson to be drawn from *amici's* cases is that, in the real world, the timing of the emergence of the evidence that enables innocence to be vindicated is often fortuitous. For example, no police officer, or prosecutor, or defense attorney in the New York state criminal justice system detected investigator Harding's shenanigans; the fact that he and other officers were fabricating evidence was learned only when he sought employment with the CIA, and told his interviewers that he would be willing to violate the law for the good of the

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[38] Indeed, often the most critical factor in determining whether an inmate's claim of innocence will succeed is whether he is able to draw the interest of the press -- but doing so ordinarily requires having a competent lawyer. *See* Freedman, supra note 6, at 316 n.5, 321. For example, media attention was vital in helping to insure the emergence of the truth in Mr. Brandley's case. *See, e.g.*, NICK DAVIES, WHITE LIES: RAPE, MURDER AND JUSTICE TEXAS STYLE (1991). This attention came into existence only after counsel made the press aware of the injustice.

country.[39]

Other non-capital cases make this point as well. Alberto Ramos was convicted in New York of raping a 5-year-old girl at a day care center where he was employed. The conviction was based "essentially on the testimony of [the child]."[40] Ramos' defense was that he never raped the child; the child's doctor testified that the child described an explicit sex act that the doctor believed no child of that age could know about without having experienced. Ramos was convicted, was given the maximum sentence, and his conviction was affirmed on appeal.

Through new counsel, Ramos sought post-conviction relief. During the pendency of these proceedings, Ramos received a tip that allowed him to demonstrate that he had been wrongly convicted. Shortly after his conviction, the child's parents filed a suit against the day care center.

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[39] CBS 60 Minutes, *supra* note 15, at 13.

[40] ***People v. Ramos***, Supreme Court of New York, Bronx County, Part 21 No. 3280/84 (Order vacating conviction) at p. 1.

Pursuant to their investigation, they learned that day care center records and other documents showed that the child often masturbated in class, simulated sexual intercourse to her peers, and had alleged falsely that a 5 year old boy had touched her just prior to her complaint against Ramos -- and that these files had been in the possession of the prosecutor at the time of trial. The parents' investigator turned this information over to Ramos' counsel.

But for this unrelated lawsuit and the tip from the investigator, Ramos might well have never learned that at the time of his trial the prosecutor possessed evidence that cast very strong doubt on the veracity of the young complainant. In dismissing the conviction, the trial court wrote that this sort of case "require[s] great care and balance on the part of the District Attorney." Order at 8. The Court concluded:

> The greatest crime of all in a civilized society is an unjust conviction. It is truly a scandal which reflects unfavorably on all participants in the criminal justice system. Ramos -- a first

> offender -- was sentenced to the maximum at the same time that the sentencing judge called on the Legislature to prescribe a harsher term. It is no wonder that Ramos, in rage, is said to have cried out, "Kill me now, I want to die."

Id, at 9. Shortly thereafter, Ramos was discharged from custody, a free man.[41]

In a recent Georgia drug case, Rusty Strickland spent six months in jail for possession of a white substance that turned out to be soap.[42] At his arrest and at his preliminary hearing, he insisted he was innocent, and even begged courtroom personnel to smell the evidence. None would. A chemist from the crime lab testified at the hearing that testing showed the substance to be cocaine.

On the eve of trial, the prosecutor learned that the chemist -- an essential witness -- was on vacation,

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[41] Marie Newman, *Man Freed After Serving 7 Years for Rape*, New York Times, June 3, 1992 at B1.

[42] Trisha Renaud, *Open and Shut, and Wrong*, Fulton Daily Law Report, September 28, 1992 at p. 1.

and sought new testing and another expert. This new expert determined the substance was soap and the charges were dismissed. But for the first chemist's vacation schedule, Strickland might well today be under a long mandatory sentence for drug trafficking.

Neither of these defendants, nor any of those jailed as a result of Harding's misconduct, had any control whatsoever over the timing of the revelations of governmental misconduct that led to their delayed acquittals. But they were all the victims of miscarriages of justice, and as worthy of those acquittals as they would have been if the evidence had emerged months before.

II. *Kuhlmann* Provides the Appropriate Miscarriage of Justice Test

Justice Powell's *Kuhlmann* miscarriage standard -- which has since been adopted by the Court -- strikes a fair balance between the concerns of fairness and finality. It recognizes that prisoners who advance colorable showings of innocence hold greater entitlement to judicial

review than do obviously guilty inmates. He wrote:

> The prisoner may have a vital interest in having a second chance to test the fundamental justice of his incarceration. Even where, as here, the many judges who have reviewed the prisoner's claims in several proceedings provided by the State and on his first petition for federal habeas corpus have determined that his trial was free from constitutional error, a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he is incarcerated.[43]

It was thus appropriate that the Court in ***Sawyer v. Whitley***, 505 U.S. ___, 112 S.Ct. 2514, 2519 n.5, 120 L.Ed.2d 269, 280 (1992), reiterated that ***Kuhlmann*** supplied the controlling rule for determining miscarriages of justice in the guilt/innocence context. Mr. Schlup's attorneys will doubtless argue in greater detail that the Eighth Circuit's decision to apply the ***Sawyer*** capital penalty phase standard

[43] 477 U.S. at 452.

to guilt phase claims is simply wrong on the law. More critically, it is wrong because this misapplication defeats the very purpose of having a miscarriage of justice doctrine concerned with "actual innocence." The idea behind that doctrine is that at least where the wrong person has been convicted, "finality principles must yield to the imperative of a fundamentally unjust incarceration," ***Engle v. Issac***, *supra* at 135. If the doctrine fails to reach persons that, upon all of the now-available evidence, would fairly probably be acquitted at a constitutional trial -- the ***Kuhlmann*** standard -- the State would be permitted to receive the unjust benefit of a constitutional error which contributed to someone who ought never to have been convicted.[44]

This is the very result the miscarriage of justice doctrine is designed to avoid. For the State to enjoy that benefit is particularly unfair in a world in which, as we

[44] Of course, the ability of a prisoner to satisfy the ***Kuhlmann*** miscarriage standard does not assure that he or she will win relief; it only obtains consideration of the underlying constitutional claim(s) whose elements and prejudicial nature must still be demonstrated.

have shown, the timing of the emergence of evidence of innocence is, at best, fortuitous, and, at worst, under the control of the State itself.

To erect unrealistic barriers to the satisfactory showing of miscarriage will surely result in the punishment of innocent people with no compensating benefit to the justice system. All prisoners, under sentence of death or not, have an incentive to get out, and hence can be counted upon to present claims of innocence as rapidly as possible. But -- in light of the formidable obstacles they usually must overcome -- this presentation may, in perfectly good faith, not occur until after an initial round of federal habeas corpus proceedings.

If the prisoner at that point must meet the draconian test imposed below (that no reasonable juror would find the defendant guilty after considering the unrecanted trial evidence), then, as a practical matter, almost no prisoner will ever meet the test. As we have shown, there are government officials to be found who will

defend an indefensible conviction to the last gasp. That gasp should not be the prisoner's.

CONCLUSION

As *amici* know all too well, we live in an imperfect world, one which includes a criminal justice system that can err in frightening ways. It is unrealistic to believe that all such errors can be eliminated at the source, but, *amici* submit, it is not asking too much to insist that the system take reasonable steps to correct such injustices once they do come to light.

Where a prisoner shows a fair probability that a reasonable factfinder, if fully informed, would have entertained a reasonable doubt as to guilt, then he or she has demonstrated a miscarriage of justice that warrants review of the merits of his or her constitutional claims.

Respectfully submitted,

Eric M. Freedman*
Hofstra University
School of Law
Hempstead, N.Y. 11550
(212) 463-5167

Harold R. Tyler, Jr.
Patterson, Belknap,
Webb & Tyler
30 Rockefeller Plaza
New York, N.Y. 10112
(212) 698-2500

Counsel for Amicus Curiae

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AMICUS CURIAE

BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LLOYD E. SCHLUP, Jr.,

Petitioner,

vs.

PAUL K. DELO, Superintendent,
Potosi Correctional Center,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
CHARLES L. HOBSON*
Criminal Justice Legal Fdn.
2131 L Street (95816)
Post Office Box 1199
Sacramento, CA 95812
Telephone: (916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

*Attorney of Record

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QUESTION PRESENTED

Does the "colorable claim of innocence" standard announced in *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986) control the "fundamental miscarriage of justice" exception to the cause and prejudice test as applied to guilt of the crime?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

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Petitioner,

vs.

PAUL K. DELO, Superintendent,
Potosi Correctional Center,

Respondent.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF RESPONDENT

Pursuant to Supreme Court Rule 37.3, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of respondent in the above-captioned case. Counsel for Petitioner has effectively refused consent, by failing to grant or explicitly refuse consent. Counsel for Respondent has consented.

In the accompanying brief, *amicus curiae* argues that the "colorable claim" standard of *Kuhlmann* v. *Wilson* does not govern the innocence exception to the cause and prejudice test.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society

to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves efforts to subvert the cause and prejudice test. Subverting this test would lead to more needless habeas litigation. The inevitable delay and waste of resources associated with such litigation is contrary to the interests CJLF was formed to protect.

For the foregoing reasons, *amicus curiae* requests for leave to file its brief.

July, 1994

Respectfully submitted,

KENT S. SCHEIDEGGER
CHARLES L. HOBSON*

Attorneys for Amicus Curiae
Criminal Justice Legal Foundation

*Attorney of Record

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IN THE

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LLOYD E. SCHLUP, Jr.,

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PAUL K. DELO, Superintendent,
Potosi Correctional Center,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

SUMMARY OF FACTS AND CASE

Petitioner was convicted and sentenced to death for the murder of Arthur Dade, a fellow inmate at the Missouri State Penitentiary. Pet. Brief 2. His conviction and sentence were affirmed by the Missouri Supreme Court on direct review. *State* v. *Schlup*, 724 S. W. 2d 236, 237 (Mo. 1987). This Court denied certiorari and his conviction and sentence were upheld in the first round of state and federal habeas corpus. Pet. Brief 7-9.

On his second round of federal habeas corpus, Petitioner claimed that his trial counsel was ineffective in failing to find and utilize evidence of his innocence. Because this was a successive habeas petition, under the rule of *McCleskey* v. *Zant*, 499 U. S. 467 (1991) a federal habeas court could not reach the merits of Schlup's claim unless he satisfied the cause and prejudice test of *Wainwright* v. *Sykes*, 433 U. S. 72 (1977) or made a sufficient showing of his actual innocence of the crime. See *Schlup* v. *Delo*, 11 F. 3d 738, 739 (CA8 1993). The District Court

dismissed Schlup's petition without reaching the merits, finding that he had neither established cause and prejudice nor satisfied the innocence exception.

The Eighth Circuit affirmed. It adopted the cause and prejudice finding of the District Court. Furthermore, applying *Sawyer* v. *Whitley*, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992), the Eighth Circuit held that Schlup did not satisfy the innocence exception to the cause and prejudice test because he had not established by clear and convincing evidence that no reasonable jury would convict him. 11 F. 3d, at 743.

SUMMARY OF ARGUMENT

The "colorable claim" standard of innocence announced by the plurality in *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986) does not control the present case. The colorable claim standard was used by the *Kuhlmann* plurality for a different purpose than its original author intended. The plurality gave little justification for choosing the colorable claim standard. This lack of analysis is consistent with the fact that the primary concern with *Kuhlmann* was limiting the scope of the "ends of justice" exception articulated in *Sanders* v. *United States*, 373 U. S. 1 (1963).

Subsequent decisions do not establish the plurality's authority. Most cases invoking the innocence exception did not even rely on the colorable claim standard. The one case other than *Sawyer* v. *Whitley*, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992) to invoke the colorable claim standard as something other than dicta did so as a statement of historical fact; it did not invoke the *Kuhlmann* standard as a holding that must be followed.

The controlling precedent is provided by *Sawyer* v. *Whitley*, *supra*. The clear and convincing standard was essential to *Sawyer*'s purpose of limiting needless stays. More importantly, the *Sawyer* Court applied the clear and convincing standard to a claim of guilt phase claim of innocence, making the standard controlling for both guilt and penalty phase claims. Thus *Sawyer* controls the present case.

Considerations of *stare decisis* aside, *Sawyer* provides the better standard. Conviction of the innocent is extremely rare, and the *Kuhlmann* standard has not been needed to protect the

innocent. Furthermore, there is a real and continuing risk of abusing habeas corpus to stay executions, something the *Kuhlmann* standard only exacerbates. Finally, the *Kuhlmann* standard is so similar to prejudice that it would subvert the cause and prejudice test.

Sawyer is an appropriate compromise of the costs and benefits raised by the innocence exception to the cause and prejudice test. It takes into account the small likelihood of innocence while checking the potential for abuse in the innocence exception. Finally, it provides a clear signal to the courts and society of the confidence we should have in the validity of convictions.

ARGUMENT

I. *Kuhlmann* v. *Wilson* does not control the present case.

The present case concerns what effect, if any, must be given to the "colorable claim" standard of proof enunciated by a plurality of this Court in *Kuhlmann* v. *Wilson*, 477 U. S. 436, 454 (1986). Petitioner asserts that the court below erred in not applying this standard to the innocence exception to the cause and prejudice test. See Pet. Brief 22. Petitioner is mistaken. The colorable claim standard of *Kuhlmann* should not govern the present case because it lacks precedential value and because it was not designed to be an exception to the cause and prejudice test. Thus the Eighth Circuit was correct in applying the "clear and convincing" standard announced by this Court in *Sawyer* v. *Whitley*, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992).

In *Kuhlmann* v. *Wilson*, *supra*, a plurality of this Court attempted to give meaning to the "ends of justice" excuse to successive petitions first articulated in *Sanders* v. *United States*, 373 U. S. 1 (1963). See 477 U. S., at 444-445. The *Kuhlmann* plurality made two choices. First, it focused the broad, ill-defined phrase "ends of justice" on the narrower, more readily ascertained issue of the prisoner's innocence. See *id.*, at 452. This focus merits much praise and little controversy. No interest is served by punishing the innocent, and our criminal justice system makes strong efforts to prevent this from happening. See *Herrera* v. *Collins*, 122 L. Ed. 2d 203, 215-216, 113 S. Ct. 853,

859-860 (1993). This focus on innocence as an exception to habeas corpus defenses such as abusive or successive writs was thus adopted by a majority of this Court in a series of cases culminating with *Sawyer* v. *Whitley*, *supra*. *Herrera*, *supra*, 122 L. Ed. 2d, at 219, 113 S. Ct., at 862.

The second choice made by the *Kuhlmann* plurality, the necessary standard of innocence a habeas petitioner had to meet, is much more controversial. Its choice of Judge Friendly's "colorable claim of innocence" standard[1] has not received any serious review by this Court until now. Its treatment by this Court in subsequent cases demonstrates that its precedential value is minimal.

A. Kuhlmann.

Kuhlmann v. *Wilson*, 477 U. S. 436 (1986) was this Court's first attempt to clean up the mess left by *Sanders* v. *United States*, 373 U. S. 1 (1963). The *Sanders* Court recognized that the ends of justice could still be invoked by a federal court to hear a successive habeas petition, but left this term undefined. See *id.*, at 16-17. As the circuit courts were showing considerable difficulty in applying *Sanders* in a consistent and principled manner, the *Kuhlmann* plurality sought to clarify what the ends of justice required. 477 U. S., at 445.

The most important decision of the *Kuhlmann* plurality was to limit the "ends of justice" inquiry to actual innocence. An undefined reliance on the abstract justice of a prisoner's cause could allow him a second chance simply because of the nature of his constitutional claim. Cf. *Murray* v. *Carrier*, 477 U. S. 478, 500 (1986) (Stevens, J., concurring in the judgment). The plurality rejected such an approach based on the history of habeas corpus and the legislative intent behind the most recent changes in the habeas corpus statute.

The plurality noted this Court's recent move away from its expansion of the writ. *Kuhlmann*, *supra*, 447 U. S., at 446-447. This retrenchment was driven by a keen understanding of the high costs associated with limitless access to federal habeas

1. See Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 160 (1970).

review. See *ibid.* A particularly important feature of this reformation was the fact that these restrictions on habeas corpus "created no danger that we were denying a 'safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty.' " *Id.*, at 447 (quoting *Stone* v. *Powell*, 428 U. S. 465, 491-492, n. 31 (1976)).

The focus on innocence was also consistent with broad principles of habeas corpus. Whether expanding or contracting habeas corpus, "the Court has reaffirmed that 'habeas corpus has traditionally been regarded as governed by equitable principles.' " *Id.*, at 447 (quoting *Fay* v. *Noia*, 372 U. S. 391, 438 (1963)).[2] Thus this Court has meant for the writ "to afford relief to those 'persons whom society has grievously wronged' . . . ." *Ibid.* (quoting *Fay*, *supra*, 372 U. S., at 440-441). Whatever these notions may have meant, they did not justify limitless examination of the constitutionality of convictions. "But the Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of a crime is afforded a trial free of constitutional error." *Ibid.*

This last statement is the key to the *Kuhlmann* plurality. Earlier decisions of this Court had placed great weight on the need for federal habeas courts to provide prisoners with an outlet for their constitutional claims. See, *e.g.*, *Fay*, *supra*, 372 U. S., at 433-434. The plurality's acknowledgement that the constitutionality of a conviction did not necessarily decide its fundamental justice continued this Court's move away from its more expansive interpretation in the 1960's and a partial return to the original understanding. See 477 U. S., at 446, 452.

While the plurality went to considerable analytic lengths to narrow the ends of justice to the question of innocence, it chose the standard of innocence in a relatively offhand manner. The only analysis the plurality engaged in before adopting the "colorable claim" standard was noting the innocent prisoner's interest in having his conviction vacated and the State's interest in preserving the finality of its convictions. See *id.*, 477 U. S.,

2. *Fay* v. *Noia* was subsequently overruled on other grounds in *Coleman* v. *Thompson*, 115 L. Ed. 2d 640, 649, 111 S. Ct. 2546, 2565 (1991).

at 452-454. Although this justifies focusing on the prisoner's innocence, it does not identify why a particular standard of innocence should apply. The plurality only gave scant justification for the colorable claim standard after announcing it.

> "As Judge Friendly persuasively argued then, a requirement that the prisoner come forward with a colorable showing of innocence identifies those habeas petitioners who are justified in again seeking relief from their incarceration. We adopt this standard now to effectuate the clear intent of Congress that successive federal habeas review should be granted only in rare cases, but that it should be available when the ends of justice so require." *Id.*, at 454.

This statement is the closest *Kuhlmann* came to an explanation of its standard. Friendly had argued for colorable claim standard as a requirement for *all* habeas petitions, whether initial or successive. See 38 U. Chi. L. Rev., at 160. While the *Kuhlmann* plurality understood this distinction, see 477 U. S., at 454, it did not deal with the implications. There is a substantial difference in the relative interests of the state and prisoners between initial and second habeas petitions. See *McCleskey* v. *Zant*, 499 U. S. 467, 492 (1991). The different interests implicated by the two proceedings must affect the calculus of what standard of proof applies. Cf. *Addington* v. *Texas*, 441 U. S. 418, 423 (1979). Importing Friendly's standard for all petitions into the very different setting of successive or abusive claims only exacerbates the lack of analysis.

It is understandable that the *Kuhlmann* plurality adopted this standard with little analysis. As shown above, the primary focus of the decision was limiting the "ends of justice" from the entirely discretionary *Sanders* standard, to the narrower and more certain inquiry into petitioner's innocence. Since there was no substantial question of the prisoner's guilt, see 477 U. S., at 455, there was no compelling need to focus on a particular standard of innocence; once innocence became the focus, the prisoner (Wilson) was going to lose regardless of the standard applied. Thus, the *Kuhlmann* standard was closer to an afterthought than a fully analyzed rule of law.

B. Subsequent Treatment.

The *Kuhlmann* plurality's colorable claim standard has received no more than cursory treatment in subsequent cases. In *Murray* v. *Carrier*, 477 U. S. 478 (1986), decided the same day, a majority of this Court noted that an exception to the cause and prejudice test for procedurally defaulted claims existed where "a constitutional violation has *probably* resulted in the conviction of one who is actually innocent . . . ." *Id.*, at 496 (emphasis added). No mention of *Kuhlmann* was made and no further explanation was given on this point. As the question of innocence was not addressed by the prisoner or the court below, this Court remanded the case for further consideration in light of the decision. *Id.*, at 497. The language in *Carrier* was subsequently quoted in two capital cases dismissing claims while making no mention of *Kuhlmann*. See *Smith* v. *Murray*, 477 U. S. 527, 537 (1986) (also decided the same day); *Dugger* v. *Adams*, 489 U. S. 401, 412, n. 6 (1989).

The fact that *Kuhlmann* was not mentioned in any of these three cases is particularly damaging to the *Kuhlmann* standard's value as precedent. While, as petitioner notes, these cases were consistent with *Kuhlmann* in focusing on the importance of innocence for the unjust conviction inquiry, see Pet. Brief 24-25, the fact that the *Kuhlmann* standard *was never mentioned*, let alone used in evaluating a claim of innocence, shows its lack of precedential value. In these three cases, the colorable claim standard is conspicuous by its absence. If the *Kuhlmann* standard were authoritative it should have been applied, or at least alluded to in these cases. The fact that *Kuhlmann* was not even mentioned in *Smith*, *Dugger*, and *Carrier* diminishes its value as precedent.

Nor can *Carrier*'s "probably resulted in the conviction of one who is actually innocent" statement be used as a stalking horse for the colorable claim standard. If anything, *Carrier* foreshadows the higher standard of *Sawyer* and not the relatively low *Kuhlmann* standard. "Probably" is defined as "[m]ost likely; presumably." American Heritage Dictionary 1443 (3d ed. 1992). This is closer to the clear and convincing standard articulated in *Sawyer* than *Kuhlmann*'s colorable claim standard.

A majority of this Court did recognize the existence of the *Kuhlmann* standard in *McCleskey* v. *Zant*, 499 U. S. 467, 495 (1991). This does not, however, establish the colorable claim standard as precedent. The issue in *McCleskey* was whether the state had to show the habeas petitioner's deliberate abandonment of a claim before successfully pleading abuse of the writ. *Id.*, at 477. McCleskey answered that question in the negative and imported the *Carrier* cause and prejudice test from procedural default cases into successive/abusive petition cases. *Id.*, at 493. The citation to *Kuhlmann* came about because the *McCleskey* Court recognized a "fundamental miscarriage of justice" exception to the cause and prejudice test it had adopted. *Id.*, at 495. This exception gave meaning to the "otherwise unexplained 'ends of justice' inquiry mandated by *Sanders*." *Ibid.* The *McCleskey* Court then noted:

> "Although the 1966 revision to the habeas statute eliminated any reference to an 'ends of justice' inquiry, a plurality of the Court in *Kuhlmann* v. *Wilson*, 477 U. S., at 454, held that this inquiry remained appropriate, and required federal courts to entertain successive petitions when a petitioner supplements a constitutional claim with a 'colorable showing of factual innocence.' " *Ibid.*

It is upon this slender reed that colorable claim standard rests. Neither *Smith*, *Carrier*, nor *Dugger* cited *Kuhlmann*. The only other cases that deal with the colorable claim standard, *Sawyer* v. *Whitley*, *supra*, and *Herrera* v. *Collins*, 122 L. Ed. 2d 203, 113 S. Ct. 853 (1993), provide no support for the *Kuhlmann* plurality's standard. *Sawyer* substituted its clear and convincing standard for the *Kuhlmann* standard, see part II, *post*, at 12-17, while the statement in *Herrera* is dicta, since *Herrera* was not concerned with the innocence exception to the cause and prejudice test. See 122 L. Ed. 2d, at 219, 113 S. Ct., at 862. *McCleskey* is thus the only possible majority support for the colorable claim test.

It is extremely weak support at best. As noted above, the appropriate standard of innocence was not the main concern of the *McCleskey* Court. Nor is the *McCleskey* Court's statement of the *Kuhlmann* plurality's holding a ringing endorsement. *McCleskey* does not say that *Kuhlmann* provides the appropriate focus for the exception to the cause and prejudice test. Indeed,

the *McCleskey* Court presents *Kuhlmann* by indirection, first noting how its miscarriage of justice exception fulfills *Sanders*' ends of justice requirement, and then noting how *Kuhlmann* supplied the colorable claim standard to satisfy the *Sanders* requirement. See 499 U. S., at 495. This is not so much an endorsement as it is a historical reference of how *Kuhlmann* dealt with the *Sanders* requirement. See *post*, at 11-12. It is at best faint praise.

As in *Kuhlmann*, the *McCleskey* Court had little need to further examine the standard of innocence, because the district judge, after considering all the evidence, "entertain[ed] absolutely no doubt about the guilt of Mr. McCleskey." See 499 U. S., at 502. As the judgment would have been affirmed under any standard, the Court's cursory treatment of the standard of innocence is understandable.

Subsequent decisions have diverged from the *Kuhlmann* plurality in another crucial manner. The plurality viewed the innocence exception as the sole means of excusing a successive petition. See *Kuhlmann*, *supra*, 477 U. S., at 455; cf. *id.*, at 470-471 (Brennan, J., dissenting) (claiming, in effect, that Wilson had cause for default). Subsequent applications of the innocence exception, however, utilize the cause and prejudice test as the primary means of admitting successive petitions. See *McCleskey*, *supra*, 499 U. S., at 493; *Sawyer* v. *Whitley*, 120 L. Ed. 2d 269, 279, 112 S. Ct. 2514, 2518 (1992). The cause and prejudice test that *Kuhlmann* omitted is expected to cover most fundamental miscarriages of justice. *Carrier*, *supra*, 477 U. S., at 495-496.

Thus while the subsequent decisions have adopted higher standards of innocence, they have actually relaxed entry for successive or abusive petitions by substituting the more common "cause" for the rare "innocence." Once the cause and prejudice test is in place, *Kuhlmann*'s colorable claim standard becomes unnecessary. This Court has implicitly recognized this position by its consistent refusal to rely on the colorable claim standard as anything more than a historical artifact.

C. The Kuhlmann Standard as Precedent.

Given its extremely limited precedential value, the colorable claim standard of *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986) does not control the present case. *Kuhlmann* is a plurality and therefore has no binding effect on its own. See *Alaska* v. *Troy*, 258 U. S. 101, 111 (1922).[3] No subsequent case justifies treating the *Kuhlmann* standard as binding precedent.[4] See part I B, *ante*, at 7-9.

The problem with the *Kuhlmann* standard is that it has never been squarely addressed by a majority of this Court. This situation is analogous to *Brecht* v. *Abrahamson*, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993), where this Court chose to adopt the "substantial influence" harmless error standard of *Kotteakos* v. *United States*, 328 U. S. 750, 776 (1946) for habeas cases in spite of the fact that several prior habeas cases applied the "harmless beyond a reasonable doubt" standard of *Chapman* v. *California*, 386 U. S. 18, 24 (1967). See, *e.g.*, *Yates* v. *Evatt*, 500 U. S. 391, 402-403 (1991); *Rose* v. *Clark*, 478 U. S. 570, 582 (1986); *Milton* v. *Wainwright*, 407 U. S. 371, 372 (1972); *Anderson* v. *Nelson*, 390 U. S. 523, 525 (1968) (*per curiam*). The rationale given by the *Brecht* Court demonstrates the importance of adequate explanation and analysis to a precedent's continuing validity.

> "[W]e have yet squarely to address its applicability on collateral review. Petitioner contends that we are bound by these habeas cases, by way of *stare decisis*, from holding that the *Kotteakos* harmless-error standard applies on habeas review of *Doyle* error. But since we have never *squarely* addressed the issue, and have at most assumed the applicability of the *Chapman* standard on habeas, we are free to address the issue on the merits." 123 L. Ed. 2d, at 368, 113 S. Ct., at 1718 (emphasis added) (footnote omitted).

3. While a holding can sometimes be distilled from split opinions by looking to the opinion decided on the narrowest ground, see *Romano* v. *Oklahoma*, No. 92-9093 (U. S., June 13, 1994) (slip op., at 6-7), this rule does not apply to *Kuhlmann*, because Justices White and Blackmun did not write a separate opinion; they simply chose not to join the successive petition discussion and joined only the "merits" portion.

4. *Kuhlmann* has, however, been affirmed by a majority of this Court for its main holding, that the "ends of justice" requirement of *Sanders* v. *United States*, 373 U. S. 1 (1963) must be focused into an examination of the prisoner's innocence. See *McCleskey* v. *Zant*, 499 U. S. 467, 495 (1991).

The relevance to the present case is both substantial and compelling. The closest a majority of this Court came to employing the *Kuhlmann* standard was in *McCleskey* v. *Zant*, 499 U. S. 467, 495 (1991), a case where the standard of innocence was unimportant to the matter before the Court. See *ante*, at 9. Like the cases dismissed in *Brecht*, *McCleskey*'s treatment of *Kuhlmann* is no more than an assumption of *Kuhlmann*'s applicability. It simply mentioned the existence of the plurality opinion. See 499 U. S., at 495. It did not even apply this standard when noting that McCleskey did not satisfy the innocence exception to the cause and prejudice test. See *id.*, at 502.

McCleskey's reference to *Kuhlmann* is also similar to the type of historical reference that was discounted in *Arizona* v. *Fulminante*, 499 U. S. 279 (1991). In *Chapman* v. *California*, this Court stated:

> "Although our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error,[8] this statement in *Fahy* itself belies any belief that all trial errors which violate the Constitution automatically call for reversal.

"[8] See, *e.g.*, *Payne* v. *Arkansas*, 356 U. S. 560 (coerced confession); *Gideon* v. *Wainwright*, 372 U. S. 335 (right to counsel); *Tumey* v. *Ohio*, 273 U. S. 510 (impartial judge)."

Chapman, *supra*, 386 U. S., at 23. This statement did not prevent the *Fulminante* Court from finding involuntary confessions amenable to harmless error analysis. The *Fulminante* Court found the phrase in *Chapman* " '[a]lthough our prior cases have indicated' " and *Chapman*'s relegation of those cases to a footnote made it "more appropriately regarded as a historical reference to the holdings of these cases." 499 U. S., at 308. *Chapman*'s treatment of prior cases parallels *McCleskey*'s treatment of *Kuhlmann*. *McCleskey* simply alludes to the

existence of the *Kuhlmann* plurality. See *ante*, at 9. Although *McCleskey* did not relegate *Kuhlmann* to a footnote, it did not apply the *Kuhlmann* standard to the issue of McCleskey's innocence. See *McCleskey*, *supra*, 499 U. S., at 502.

Precedents are not all alike. Cases where the point was clearly at issue and thoroughly discussed and decided by a majority of the Court deserve and are given the full protection of *stare decisis*. *Kuhlmann*'s standard of innocence is not such a case. It is a plurality decision that gave little analytical support to its colorable claim standard. It has never been adopted by a majority of this Court in a way that gives it strength as precedent. Thus it should not prevent a careful examination of the question on the basis of *stare decisis*.

II. The *Sawyer* standard governs the present case.

Although the *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986) plurality opinion does not provide the standard to govern the present case, *Sawyer* v. *Whitley*, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992) does. It squarely applied its clear and convincing standard to a guilt phase claim of innocence and thoroughly rejected the *Kuhlmann* standard. Because it is the only case to truly decide this issue, *Sawyer* governs the present case.

A. The Sawyer Standard.

The *Sawyer* Court was faced with the difficult task of determining when, if ever, a prisoner could be "innocent of the death penalty," and thus allow a habeas court to hear a procedurally defaulted, abusive, or successive challenge to his death sentence. *Id.*, 120 L. Ed. 2d, at 279, 112 S. Ct., at 2519-2520. What is first noteworthy is how little the *Sawyer* Court relied on *Kuhlmann* and its colorable claim standard. It referred to *Kuhlmann* in primarily historical terms. In a footnote, the Court stated that "[o]ur standard for determining actual innocence was articulated in *Kuhlmann* as:" and then quoted *Kuhlmann*'s colorable claim standard. *Id.*, 120 L. Ed. 2d, at 280, n. 5, 112 S. Ct., at 2519. "Our standard . . . was articulated . . . as" is too passive and historical to be considered an affirmation of the *Kuhlmann* standard. Instead, it is better viewed as a historical

reference that accords no precedential value to *Kuhlmann*. See *Arizona* v. *Fulminante*, 499 U. S. 279, 308 (1991); *ante*, at 11. Instead, the *Sawyer* Court developed its own standard of innocence.

The *Sawyer* Court saw itself confronted with two major problems. First was the difficult task of determining what was meant by the unnatural phrase "innocent of death." 120 L. Ed. 2d, at 281, 112 S. Ct., at 2520. The second problem was related, but distinct from the first. The Court had to fashion its answer in a way that kept the innocence exception narrow and workable so that the innocence exception does not swallow up the cause and prejudice test it is meant to serve.

> "In defining this analog, we bear in mind that the exception for 'actual innocence' is a very narrow exception, and that to make it workable it must be subject to determination by relatively objective standards. In the every day context of capital penalty proceedings, a federal district judge typically will be presented with a successive or abusive habeas petition a few days before, or even on the day of, a scheduled execution, and will have only a limited time to determine whether a petitioner has shown that his case falls within the 'actual innocence' exception if such a claim is made." *Ibid.*

The *Sawyer* Court solved the first problem by defining penalty "innocence" in terms of eligibility for the death penalty. Something had to qualify as innocence of the death penalty. Eligibility was close to the concept of innocence, while at the same time avoiding the type of open-ended inquiry that leads to abusive delays. See *id.*, 120 L. Ed. 2d, at 283-284, 112 S. Ct., at 2522.

This was not the end of the inquiry, however. The *Sawyer* Court understood that focusing on eligibility was not enough. Without a sufficiently narrow standard of demonstrating innocence, there could still be a danger of abuse. To further protect habeas corpus from capital prisoners' manipulation, the *Sawyer* Court established an appropriately high standard of innocence. It established that the prisoner must "show by clear and convincing evidence that but for constitutional error at his sentencing hearing, no reasonable juror would have found him eligible for

the death penalty . . . ." *Id.*, 120 L. Ed. 2d, at 287, 112 S. Ct., at 2525. This standard was applied to both guilt and penalty phase claims in *Sawyer* and thus governs the present case.

Sawyer made two distinct claims against his death sentence. One claim concerned evidence regarding the question of whether he burned his victim with lighter fluid, which Sawyer claimed was withheld in violation of *Brady* v. *Maryland*, 373 U. S. 83 (1963). *Sawyer*, 120 L. Ed. 2d, at 285, 112 S. Ct., at 2523. The second was that his trial counsel rendered ineffective assistance in failing to introduce evidence of Sawyer's earlier stays in mental hospitals. *Ibid.* The *Sawyer* Court dismissed the second claim out of hand, as it did not go to his eligibility for the death sentence. *Id.*, 120 L. Ed. 2d, at 285-286, 112 S. Ct., at 2523-2524.

The *Brady* claim was much more important, because it attacked both Sawyer's sentence and his underlying conviction. Sawyer was convicted of first-degree murder with two valid aggravating circumstances, "that the murder was committed in the course of an aggravated arson, and that the murder was especially cruel, atrocious and heinous." *Id.*, 120 L. Ed. 2d, at 285, 112 S. Ct., at 2523. Of the various forms of first-degree murder in Louisiana, the only one that could support Sawyer's conviction was " '[w]hen the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of . . . aggravated arson . . . .' " *State* v. *Sawyer*, 422 So. 2d 95, 98-99 (La. 1982) (quoting La. Rev. Stat. Ann. § 14:30 (West 1986). Therefore, any attack on aggravated arson was both an attack on Sawyer's eligibility for the death penalty *and* an attack on his guilt of the underlying crime, first-degree murder. See 120 L. Ed. 2d, at 286, 112 S. Ct., at 2524.

Sawyer's *Brady* claim contained two groups of evidence. The first was evidence impeaching Cynthia Shano, whose trial testimony supported the aggravated arson finding. See *ibid.*; 422 So. 2d, at 98, 99. Sawyer asserted that this evidence supported a "colorable showing" that he was innocent of the underlying crime. See Brief for Petitioner in *Sawyer* v. *Whitley*, No. 91-6382, p. 49 ("Sawyer Brief"). In dismissing this guilt phase claim, the *Sawyer* Court relied solely upon the clear and convincing standard. "This sort of latter day evidence brought

forward to impeach a prosecution witness will seldom, if ever, make a *clear and convincing* showing that no reasonable juror would have believed the heart of Shano's account of petitioner's actions. 120 L. Ed. 2d, at 286, 112 S. Ct., at 2524 (emphasis added). *Kuhlmann* was entirely absent from this discussion.

The second aspect of the *Brady* claim raised a stronger attack against the murder conviction. This was an affidavit by Diane Thibodeaux, who claimed to have heard the four-year-old who witnessed the killing make statements exculpating Sawyer from the aggravated arson. *Ibid.* Even though Sawyer was asserting his innocence of both his crime and sentence, see Sawyer Brief 49, the *Sawyer* Court used the same clear and convincing standard to dismiss both claims.

> "As for the finding of aggravated arson, we agree with the Court of Appeals that, even crediting the information in the hearsay affidavit,[18] it cannot be said that no reasonable juror would have found, in light of all the evidence, that petitioner was guilty of the aggravated arson for his participation under the Louisiana law of principals.

> "[18] Wayne Shano apparently has no clear memory of the crime today. 2 App. 602-603. This fact, together with his tender years at the time of the occurrence, suggests that Wayne himself would not corroborate the affidavit of Diane Thibodeaux, thus suggesting an independent basis for refusing to find that the affidavit showed anything by *clear and convincing evidence*." *Id.*, 120 L. Ed. 2d, at 286-287, 112 S. Ct., at 2524 (emphasis added).

This makes the case against the *Kuhlmann* standard compelling. If the colorable claim standard had any vitality it would have been applied to this last aspect of Sawyer's claim. The fact that the clear and convincing standard was used instead demonstrates that the *Kuhlmann* standard did not survive *Sawyer*. Indeed, no Justice in *Sawyer* believed that the *Kuhlmann* standard should govern claims of innocence. The opponents of the clear and convincing standard would have replaced it not with *Kuhlmann*'s colorable claim, but with the higher "*more likely than not*" standard. *Id.*, at 120 L. Ed. 2d, at 295, 112 S. Ct., at 2531 (Stevens, J., concurring in the judgment)

(emphasis in original). As the *Sawyer* majority implicitly recognized, the colorable claim standard, as applied to the innocence exception, was only a historical artifact. See 120 L. Ed. 2d, at 280, n. 5, 112 S. Ct., at 2519, n. 5.

B. The Ineffective Distinction.

Petitioner endeavors to avoid the *Sawyer* standard by pigeonholing it as a way of narrowing the focus of "innocent of the death penalty" claims. Pet. Brief 27-28. It is true that the *Sawyer* Court was concerned about promulgating a broad or subjective definition of innocence of the penalty. Thus it properly dismissed the notion that the innocence question should focus on the accuracy of the prisoner's sentencing profile because such an inquiry would be too broad and difficult to apply. *Sawyer*, 120 L. Ed. 2d, at 284, 112 S. Ct., at 2522.

The *Sawyer* Court solved this problem by limiting the innocence question to the narrow, objective eligibility issue. While the decision to impose death involved the "individualized consideration of a particular defendant," *id.*, 120 L. Ed. 2d, at 282, 112 S. Ct., at 2521, eligibility focuses "on the *objective* factors or conditions which must be shown to exist before a defendant is eligible to have the death penalty imposed." *Id.*, 120 L. Ed. 2d, at 284, 112 S. Ct., 2523 (emphasis added).

Petitioner claims that the clear and convincing standard was imposed to narrow eligibility factors that "turn in many cases upon a highly discretionary jury judgment (such as whether ' "the offense was committed in an especially cruel, atrocious and heinous manner." ')." Pet. Brief 28 (quoting *Sawyer*, *supra*, 120 L. Ed. 2d, at 278, n. 2, 112 L. Ed. 2d, at 2517, n. 2). This demonstrates a fundamental misunderstanding of eligibility factors in capital cases. The entire purpose of the eligibility determination is to *limit* jury discretion. It "must genuinely *narrow* the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant* v. *Stephens*, 462 U. S. 862, 877 (1983) (emphasis added). A state's eligibility requirement therefore must achieve its narrowing task "by providing 'specific and detailed guidance' to the sentencer," *McCleskey* v. *Kemp*, 481 U. S. 279, 303 (1987) (quoting *Proffitt* v. *Florida*, 428 U. S. 242, 253 (1976)), so that it "channel[s] the sentencer's discretion." *Lewis* v. *Jeffers*, 497 U. S. 764, 774 (1990). An eligibility factor that turned on "highly discretionary jury judgment," Pet. Brief 28, would violate the Eighth Amendment. Indeed, the very language petitioner cites, *ibid.*, would be struck down if it were not given a narrowing construction by the state courts. *Lewis* v. *Jeffers*, 497 U. S., at 776-777.

Thus, as the *Sawyer* Court understood, once the inquiry was shifted to eligibility, further narrowing was unnecessary. The clear and convincing standard did not deal with the already solved narrowing problem, but instead dealt with the problem of preserving the integrity of verdicts and avoiding needless stays, problems that are common to both the guilt and penalty determinations. See part III B, *post*, at 21-24. Because it provides a solution to a universal problem, *Sawyer*'s clear and convincing standard should be applied universally. The *Sawyer* Court understood this and thus applied the standard to Sawyer's challenges to his sentence *and* his conviction. In applying the clear and convincing standard to Schlup's challenge of his conviction, the Court below was simply following in the footsteps of the *Sawyer* Court. *Stare decisis* demanded no less, and *stare decisis* requires affirming the Court below.

III. The *Sawyer* standard is superior to the *Kuhlmann* standard.

The case for giving controlling effect to *Sawyer* v. *Whitley*, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992) is both clear and strong. See part II, *ante*, at 12-17. Any remaining doubts about the relative precedential value of *Sawyer* and *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986) are swept away by comparing the practical effect of the two cases. The colorable claim standard of *Kuhlmann* would have been useful for Judge Friendly's intended purpose as a filter on *all* habeas cases, but it is ill-suited as an exception to the cause and prejudice test for second petitions. The *Kuhlmann* standard would be yet another weapon in the arsenal of delay that too often frustrates society's essential interest in obtaining swift execution of punishment.

The *Sawyer* standard was designed with this problem in mind. It will help avoid needless stays and improper collateral attacks upon convictions. At the same time, *Sawyer* will continue to protect the miscarriage of justice standard by allowing collateral attacks by those who are actually innocent. Because it strikes the proper balance between respect for finality and the prisoner's interests, the *Sawyer* standard makes sense both as a matter of *stare decisis* and sound judicial policy.

A. The Myth of Innocence.

The prisoner and supporting *amicus* both endeavor to support the *Kuhlmann* standard as necessary to protect supposed potential multitudes of innocently convicted prisoners sitting out their sentences or, more importantly, awaiting execution. See Pet. Brief 32-33. Brief for Five Innocent Former Death Row Inmates & Centurion Ministries as *Amicus Curiae* (hereinafter Centurion Brief) 10-11. However, as this Court's habeas cases correctly presume, conviction of the innocent is an exceedingly rare event. More importantly, a second round of federal habeas has not yet been needed to free an allegedly innocent prisoner.

This Court's habeas jurisprudence is built on the assumption that the overwhelming majority of those convicted are guilty. Thus, a presumption of regularity attaches to convictions. See *Johnson* v. *Zerbst*, 304 U. S. 458, 468 (1938). There are an enormous number of constitutional rights designed to protect the innocent at trial, see *ante*, at 3, making the trial, not collateral attack, the main event of the criminal justice system. See *Wainwright* v. *Sykes*, 433 U. S. 72, 90 (1977). It is thus understandable that innocence is expected to be no more than a narrow exception, reserved for the "extraordinary case . . . ." *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986).

Experience shows the correctness of this Court's findings. A study alleging numerous executions of innocent people, see Bedau & Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 Stan. L. Rev. 21 (1987), is demolished, to the extent it applies to our modern legal system, in a point by point rebuttal. See Markman & Cassell, Protecting the Innocent: A Response to the Bedau-Radelet Study, 41 Stan. L. Rev. 121 (1988). Great *cause celebres* thought to be innocent turn out to be guilty in the eyes of nonpartisan history. See generally F.

Russell, Sacco & Vanzetti, The Case Resolved (1986). In the overwhelming majority of cases, the American criminal justice system *does* work. More importantly, neither Schlup nor Centurion Ministries has provided this Court with a case where a *second* federal habeas petition was needed to free an innocent person.

Petitioner gives two main examples of the danger of setting the innocence standard too high, the "Scottsboro Boys" and the Leo Frank case. Pet. Brief 33-34. While these cases no doubt represent low points in American legal history, they do not show that extraordinary habeas measures are now needed to protect innocent people from the state. The Scottsboro Boys had their initial convictions reversed on direct review in one of this Court's landmark cases. See *Powell* v. *Alabama*, 287 U. S. 45 (1932). While Leo Frank's claims were rejected in his initial (and only) round of habeas corpus, see *Frank* v. *Mangum*, 237 U. S. 309 (1915), the critical question was whether the trial was mob dominated as a factual matter. See *id.*, at 333. If a mob-dominated trial would occur today, it would certainly be overturned in state court or the first federal petition. *Frank* v. *Mangum* is not relevant to successive petitions.

More importantly, times have changed. Whatever problems exist today, they are far removed from the pervasive religious and racial animus that dominated the Scottsboro and Frank cases. Furthermore, the ensuing years have seen the creation of a host of constitutional rights designed to help innocent defendants. See *Herrera* v. *Collins*, 122 L. Ed. 2d 203, 215-216, 113 S. Ct. 853, 859-860 (1993). Finally, the days are gone when state courts would resist the commands of the federal Constitution. Cf. *Estes* v. *Texas*, 381 U. S. 532, 556 (1965). Today, the state courts are recognized as coequal partners with the lower federal courts and willing protectors of the Constitution. See *Sawyer* v. *Smith*, 497 U. S. 227, 241 (1990). The threat of Scottsboro is gone.

Centurion Ministries' case is no better. None of the five former death row members represented in the brief needed to resort to the *Kuhlmann* standard to be freed.

Randall Dale Adams had his death sentence vacated by this Court on direct review, *Adams* v. *Texas*, 448 U. S. 38 (1980); and was removed from death row by executive clemency at the

request of the prosecutor. See *Ex parte Adams*, 768 S. W. 2d 281, 293 (Tex. Crim. App. 1989). His conviction was subsequently set aside in a state, not federal, proceeding. *Id.*, at 294. Furthermore, the basis of Adams' conviction, the prosecution's knowing but undisclosed use of false evidence and the suppression of exculpatory evidence, see *id.*, at 284, would certainly satisfy the cause and prejudice test. See *Amadeo* v. *Zant*, 486 U. S. 214, 222 (1988); cf. *Engle* v. *Isaac*, 456 U. S. 107, 135 (1982) (most fundamentally unjust convictions will satisfy the cause and prejudice test).

Kirk Bloodsworth's initial conviction and death sentence were overturned for failure to disclose exculpatory evidence on direct review in state court. See *Bloodsworth* v. *State*, 512 A. 2d 1056, 1061 (Md. 1986). On retrial, he was reconvicted but sentenced to life in prison. *Bloodsworth* v. *State*, 543 A. 2d 382, 384 (Md. App. 1988). Once DNA testing demonstrated Bloodsworth's innocence, the State of Maryland freed him. See J. Valentine, Jailed for Murder, Freed by DNA, The Washington Post, June 29, 1993, p. A1, col. 1. This new scientific technique precluded the need to go to the federal court.

Clarence Lee Brandley was released in a state proceeding. *Ex parte Brandley*, 781 S. W. 2d 886 (Tex. Crim. App. 1989). As in *Adams*, the state's suppression of exculpatory evidence, see *id.*, at 894, is the type of violation that would satisfy the cause and prejudice test. While it was a federal court that reversed Joseph Green Brown's conviction due to the prosecution's knowing use of perjured testimony, it was on his initial petition; there was no need to resort to the cause and prejudice test or *Kuhlmann*. See *Brown* v. *Wainwright*, 785 F. 2d 1457, 1458 (CA11 1986). Finally, Walter McMillan's conviction was reversed in state court because of the state's suppression of exculpatory evidence. See *McMillan* v. *State*, 616 So. 2d 933, 949 (Ala. Crim. App. 1993).

It is also noteworthy that *all five* cases involved either the suppression of evidence or the knowing use of false evidence, classic examples of "cause" under the *Sykes* test. See *Amadeo*, *supra*, 486 U. S., at 222. Far from providing justification for the *Kuhlmann* standard, Centurion Ministries gives compelling evidence of the wisdom of *Carrier*'s conclusion that in virtually

every case of a fundamental miscarriage of justice, the prisoner will satisfy the cause and prejudice test.

In spite of their considerable efforts, neither petitioner nor Centurion Ministries has found an example of an innocent person exonerated on a successive federal petition. Instead, their examples show how well the system works without having to resort to the innocence exception. At trial, the defendant is lavishly protected by constitutional rights. See *Engle*, *supra*, 456 U. S., at 127. On appeal, the defendant will be entitled to court appointed counsel. *Douglas* v. *California*, 372 U. S. 353 (1963). Finally, the prisoner will get an initial round of state and federal habeas corpus and the chance of direct review in this Court to present his claims. Given the considerable lengths our system goes to in protecting the innocent, it is entirely understandable that the *Kuhlmann* standard has not been needed.

A recent development has further lessened the already minimal need for relaxed standards of innocence. In 1988, as part of the Anti-Drug Abuse Act of 1988, Congress enacted extensive provisions for federal funding of collateral attacks by prisoners sentenced to death. See 21 U. S. C. § 848(q)(4)(B); *McFarland* v. *Scott*, No. 93-6497 (U. S., June 30, 1994). Federally funded counsel will no doubt even further reduce the already minimal chance of claims being accidentally abandoned or overlooked on the initial collateral attack. Cf. *Murray* v. *Giarratano*, 492 U. S. 1, 14 (1989) (Kennedy, J., concurring in the judgment). While it is true that this system was not in place for the bulk of the first round of collateral review in the present case, see Pet. Brief 7-9, it is equally true that in the future all capital prisoners will have federal funding for their initial habeas petitions. The risk of inept habeas counsel will fade away for capital prisoners, making the need for the lenient *Kuhlmann* standard even lower.

B. The Real Risks.

1. The problem with stays.

Although the need for the lower standard of *Kuhlmann* is minimal, see part III A, *ante*, at 18-21, its risks are all too real. The *Kuhlmann* standard is an open invitation to the abusive use

of stays of execution this Court sought to limit in *Sawyer* v. *Whitley*, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992).

This Court is intimately aware of the problems of stays of execution in federal habeas corpus. See, *e.g.*, *Sawyer*, *supra*, 120 L. Ed. 2d, at 281, n. 7, 112 S. Ct., at 2520, n. 7; *Gomez* v. *District Court*, 118 L. Ed. 2d 293, 296, 112 S. Ct. 1652, 1653 (1992) (*per curiam*). A prisoner under a sentence of death has everything to gain and nothing to lose when attempting to gain a stay of execution. For a prisoner who has no real chance of reversing his conviction or sentence, obtaining a stay of execution is like winning the case. So long as he frustrates the state's right to execute its judgment, the prisoner wins.

The cause and prejudice test and the innocence exception play an important role in reducing the risk of abusive stays. A major problem with habeas corpus is the eleventh-hour stay of execution granted by a federal court because it feels it does not have time to review the issues raised by the prisoner before his execution. See *Sawyer*, *supra*, 120 L. Ed. 2d, at 281, n. 7, 112 S. Ct., at 2520, n. 7. Because these last minute requests for stays will almost always involve procedurally barred, abusive, or successive claims, the cause and prejudice test and the innocence exception can play important roles in resolving most of these dilemmas for the federal courts. This test and its innocence exception help channel the inquiry and discretion of federal habeas courts when faced with the issue of whether to accept for decision a defaulted, abusive, or successive claim. See *Murray* v. *Carrier*, 477 U. S. 478, 496-497 (1986). A properly narrow cause and prejudice test and innocence exception can thus take much pressure off the federal courts by filtering out weak claims.

The *Kuhlmann* standard frustrates this goal by needlessly lowering the threshold of innocence. The *Kuhlmann* plurality only requires that the prisoner show "a colorable claim of factual innocence." *Kuhlmann* v. *Wilson*, 477 U. S. 436, 454 (1986).

There are real dangers to applying this improperly lax standard. A particularly forthright example of this is the ghoulish circus that attended the execution of Robert Alton Harris. As this Court knows too well, the night before Harris' execution various judges in the Ninth Circuit issued four

different stays of execution, one of which was made in defiance of this Court's previous decision to vacate earlier Ninth Circuit stays. See Note, The Robert Alton Harris Decision: Federalism, Comity, and Judicial Civil Disobedience, 23 Golden Gate U. L. Rev. 155, 160-161, 194 (1993) ("Harris Case"); *Gomez*, *supra*, 118 L. Ed. 2d, at 296, 112 S. Ct., at 1653. This grim spectacle included one stay of execution that reached "the prison after Harris had already been strapped into the chair." Harris Case, *supra*, 23 Golden Gate U. L. Rev., at 161. The hours leading up to Harris' execution were a war of attrition fought with phones and fax machines that could not be concluded until this Court prevented all federal courts but itself from staying Harris' execution. See *Vasquez* v. *Harris*, 118 L. Ed. 2d 419, 112 S. Ct. 1713, 1714 (1992). This unseemly and unnecessary battle brought down considerable criticism of our legal system. See Harris Case, *supra*, 23 Golden Gate U. L. Rev., at 157, nn. 17-18.

While the bulk of the stays in the *Harris* case involved a spurious Eighth Amendment challenge to the gas chamber intended to extract a last minute stay of execution, see *Gomez*, *supra*, 118 L. Ed. 2d, at 269, 112 S. Ct., at 1653, the question of innocence also played a part in this spectacle. The first stay issued by a Ninth Circuit judge was on the ground that "a sufficient hearing had not been granted on new evidence that Harris' brother and partner in crime, Daniel had shot one of the two victims Harris was convicted of murdering." Harris Case, *supra*, 23 Golden Gate U. L. Rev., at 160. This claim of innocence was certainly spurious. Harris had confessed to committing the murders on seven separate occasions. See Lungren & Krotoski, Public Policy Lessons from the Robert Alton Harris Case, 40 U. C. L. A. L. Rev. 295, 297-298, n. 5 (1992). Furthermore, Harris' claim that his brother had shot the boys had previously been rejected by U. S. District Judge Howard B. Turrentine, who stated that had the claim been true "it would have been discovered a long time ago." Harris Case, *supra*, 23 Golden Gate U. L. Rev., at 199, n. 324.

Granting of a stay on such flimsy evidence shows the need to depart from the relatively mild *Kuhlmann* standard. While, as the first stay unfortunately shows, some may entertain reasonable doubt on such minuscule evidence, no judge could possibly

believe that this claim proved his innocence by the clear and convincing evidence standard of *Sawyer*. Furthermore, the higher standard of *Sawyer* would send a signal to the lower federal courts regarding the high confidence they must place in convictions. See *Addington* v. *Texas*, 441 U. S. 418, 423 (1979). This signal can only dissuade federal courts from granting such needless stays.

2. Subverting cause and prejudice.

The innocence exception to the cause and prejudice test must establish a standard high enough to distinguish the innocence test from the prejudice required in constitutional cases such as *Strickland* v. *Washington*, 466 U. S. 668, 687 (1984). *Sawyer*, *supra*, 120 L. Ed. 2d, at 283-284, 112 S. Ct., at 2522. A standard that did not clear this hurdle would subvert the cause and prejudice test. *Id.*, 120 L. Ed. 2d, at 284, n. 13, 12 S. Ct., at 2522, n. 13. The colorable claim standard cannot clear this hurdle.

The *Strickland* standard of prejudice is that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, *supra*, 466 U. S., at 694. This is effectively the same as the colorable claim standard in "a fair probability that, in light of all the evidence . . . the trier of facts would have entertained a reasonable doubt of his guilt." *Kuhlmann* v. *Wilson*, 477 U. S. 436, 455, n. 17 (1986). There is no real difference between "a reasonable probability . . . that the result of the proceeding" would change from guilty to not guilty, and a "fair probability" that the factfinder would entertain reasonable doubt. Yet there must be some difference between prejudice and the standard of innocence. In order to preserve the cause and prejudice test, a higher standard must be found.

C. The Sawyer Solution.

The solution to the problems posed by the *Kuhlmann* standard is found in *Sawyer* v. *Whitley*, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992). As the *Sawyer* Court understood, its clear and convincing standard is best for innocence claims made against either guilt or penalty findings. See *ante*, at 13-16. It strikes the proper balance between the need to preserve finality

and the desire to prevent fundamental miscarriages of justice. Finally, it sends the appropriate signal to the courts and public about the high confidence they should have in the validity of convictions.

An integral part of habeas corpus jurisprudence is assessing costs and benefits. See, *e.g.*, *McCleskey* v. *Zant*, 499 U. S. 467, 490-493 (1991); *Teague* v. *Lane*, 489 U. S. 288, 310 (1989) (plurality). As this type of analysis is also important to the adoption of standards of proof, see, *e.g.*, *Addington* v. *Texas*, 441 U. S. 418, 423-424 (1979), it makes sense to assess the costs and benefits of the innocence exception.

The benefit of the innocence exception, voiding convictions of innocent people, is very important, but extraordinary. See *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986). History shows that the conviction of the innocent is mercifully rare, and that the innocence exception to the cause and prejudice test has not been necessary to protect the very few innocent prisoners. See part III A, *ante*, at 18-21. Given the lavish constitutional protections afforded defendants, this comes as no surprise. See *Herrera* v. *Collins*, 122 L. Ed. 2d 203, 215-216, 113 S. Ct. 853, 859-860 (1993). Any assessment of the standard of proof for the innocence exception must keep the extreme rarity of innocence in mind.

The rareness of innocence also creates a risk to the truly innocent prisoner if the standard of proof is too low. "It must prejudice the occasional meritorious application to be buried in a flood of worthless ones." *Brown* v. *Allen*, 344 U. S. 443, 537 (1953) (Jackson, J., concurring); accord, *McCleskey*, *supra*, 499 U. S., at 492. This risk is all too real with respect to claims of innocence. The convicted, particularly those under a death sentence, have nothing to lose and everything to gain by proclaiming their innocence. The cynical abuse of federal habeas corpus by some counsel, see *Gomez* v. *District Court*, 118 L. Ed. 2d 293, 296, 112 S. Ct. 1652, 1653 (1992) (*per curiam*), and the fact that some federal judges will buy into spurious last minute claims of innocence, see *ante*, at 23-24, renders these fears tangible. A sufficiently high standard will thus help protect the few who are truly innocent by filtering out the many spurious claims.

The costs of federal habeas are well known. Reexamination of state convictions "frustrate[s] . . . 'both the State's sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.' " *Carrier*, *supra*, 477 U. S., at 487 (quoting *Engle* v. *Isaac*, 456 U. S. 107, 128 (1982)). The lack of finality associated with habeas corpus deprives the criminal law "of much of its deterrent effect." *Teague*, *supra*, 489 U. S., at 309. If the petitioner succeeds in getting a reversal, the passage of time can make retrial very difficult. *McCleskey*, *supra*, 499 U. S., at 491. The state's power to enact and enforce criminal law means little if habeas corpus frustrates its enforcement. *Ibid*. Federal habeas corpus also places a heavy burden on scarce federal judicial resources and threatens the capacity of the system to resolve primary disputes." *Ibid*. Finally, it creates the risk of sandbagging, where litigants have an incentive "to withhold claims for manipulative purposes and may establish disincentives to present claims when evidence is fresh." *Id.*, at 491-492.

These costs accelerate dramatically on successive and abusive petitions. "Perpetual disrespect for the finality of convictions disparages the entire criminal justice system." *Id.*, at 492. Sadly, successive and abusive petitions are a much abused tool of delay. See *Sawyer*, *supra*, 120 L. Ed. 2d, at 281, n. 7, 112 S. Ct., at 2520, n. 7. Furthermore, successive petitions spread the already thin federal judicial resources even thinner and exacerbate the risk of losing the rare meritorious claims in a sea of spurious claims. *McCleskey*, *supra*, 499 U. S., at 492.

Sawyer's clear and convincing standard maintains an appropriate balance of costs and benefits. While there will be a few rare cases of actual innocence, the bulk of claims will be spurious, and the clear and convincing standard will provide the proper filter for these claims.

The prisoner invoking the innocence exception does not write on a clean slate. There is a presumption against hearing claims defaulted in state court or not heard in the first round of federal habeas corpus. *Id.*, at 490. Furthermore, habeas petitioners generally have the burden of proving the illegality of their conviction. *Johnson* v. *Zerbst*, 304 U. S. 458, 468 (1938); *Hawk* v. *Olson*, 326 U. S. 271, 279 (1945). The clear and convincing standard gives teeth to the further presumption

against defaulted, abusive, or successive claims. The standard of proof allocates risk of error between the parties in an action. See *Addington*, *supra*, 441 U. S., at 423-424. Given the strong presumptions against his claim, and the minimal risk that a habeas petitioner is actually innocent, it makes sense to require a strong showing for further collateral attack.

The *Sawyer* standard is also consistent with the cause and prejudice test. The *Kuhlmann* standard is close enough to simple prejudice to threaten the cause and prejudice test by eliminating the need for cause. See part III B 2, *ante*, at 24. The *Sawyer* Court was well aware of this risk, 120 L. Ed. 2d, at 284, n. 13, 112 S. Ct., at 2522, n. 13, and the clear and convincing standard keeps the cause and prejudice test safe.

The standard of proof reflects society's interest in the confidence a factfinder must have in its decision. *Addington*, *supra*, 441 U. S., at 423. It also conveys important symbolic meaning. *Id.*, at 426. The *Sawyer* standard succeeds on both counts. It informs the federal courts of the justified confidence they must have in state convictions, and they should be very careful before exercising the truly extraordinary innocence exception to the cause and prejudice test. Any lower standard can only imperil the cause and prejudice test and the many habeas reforms it serves.

CONCLUSION

The decision of the Eighth Circuit should be affirmed.

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Respectfully submitted,

KENT S. SCHEIDEGGER
CHARLES L. HOBSON*

Attorneys for Amicus Curiae
Criminal Justice Legal Foundation

*Attorney of Record